Supreme Court, U. S.
FILED
MAY 2 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Appellants,

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

STATE OF WASHINGTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

and

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

On Appeal from the District Court of the Eastern District of Washington

BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE

HELENA S. MACLAY
DEIRDRE BOGGS
KEITH C. RENNIE
Special Assistant Attorneys General
State of Montana
Attorneys for Amicus Curiae

P. O. Box 8957
Missoula, Montana 59807
Telephone: (406) 243-6264

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Interest of the Amicus Curiae 2

Summary of Argument 3

Argument:

Tribal Ordinances Cannot Preempt State Taxing Authority Over Non-Indians 4

A. The District Court Misinterpreted the Tribal Taxing Schemes 5

B. Indian Tribes Have No Authority to Impose a Cigarette Sales Tax Upon Non-Indians 5

C. The Tribal Taxing Ordinances, Whether Imposed on Indians or Non-Indians, Cannot Preempt Valid State Taxing Authority 7

Washington State's Cigarette Taxing Scheme Does Not Constitute an Interference With Tribal Self-Government 8

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Douglas v. Seacoast Products, Inc., 431 U. S. 265 (1977) 7

Jones v. Rath Packing Co., 430 U. S. 519 (1977) 7

McClanahan v. Arizona State Tax Commission, 411 U. S. 164, 179 9

TABLE OF AUTHORITIES—Continued

Pages

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) 7

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 4, 7, 8, 10

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 6

Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1973) 7

The Crow Tribe of Indians, et al. v. The State of Montana, et al., No. CV-78-110-BLG 2

United States v. McGowan, 302 U.S. 535 (1938) 7, 8

United States v. Wheeler, 435 U.S. 313 (1978) 6

Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 690 (1965) 7

Williams v. Lee, 358 U.S. 217, 220 (1959) 4, 5, 7, 9, 16

RULE:

Rule 42 of the Supreme Court Rules 1

In The

Supreme Court of the United States

October Term, 1978

—o—

No. .....

—o—

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Appellants,

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

STATE OF WASHINGTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

and

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

—o—

On Appeal from the District Court of the Eastern District of Washington

—o—

BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE

—o—

Pursuant to Rule 42 of the Supreme Court Rules, the State of Montana files this brief as *amicus curiae.*

—o—

INTEREST OF THE AMICUS CURIAE

The *amicus curiae,* the State of Montana, has a vital interest in this case because the opinion of the three-judge District Court will result in the erosion of the State of Montana's authority to tax and regulate its citizens. In addition, the decision of the three-judge District Court gives unprecedented recognition to the power of tribes to tax non-Indians on reservations. The State of Montana has within its boundaries seven Indian reservations, on which many non-Indians reside and do business. The District Court's opinion gives Montana's tribes both the power and the incentive to tax non-Indians. This new power, which will certainly be exercised by all tribes, will inevitably result in non-Indians being required to pay taxes to tribes for the support of tribal governments in which non-Indians have no right to participate.

The District Court opinion will have far-reaching and disastrous effects upon Montana's citizens and government. Although the case deals only with tribal cigarette taxes, the three-judge District Court did not take into consideration the certainty that its holding will be applied to other reservations and taxation schemes. The State of Montana now has pending in the Court of Appeals for the Ninth Circuit the case entitled, *The Crow Tribe of Indians et al. v. The State of Montana, et al.,* No. CV-78-110-BLG, in which the Crow Tribe of Indians claimed that its tribal severance tax must preempt Montana's Coal Severance Tax. In that case, the District Court dismissed the complaint for failure to state a claim, and rejected the tribal preemption argument. At stake for the State of Montana are approximately 18 million dollars in severance taxes

which have been collected by the State of Montana since 1975. It is anticipated that coal production on the Crow Reservation will escalate, with increasing tax revenues being paid by coal producers (not the Indian Tribe) to the State of Montana.

The State of Montana will address only the issues of whether Indian Tribes can tax non-Indians, whether a tribal taxing ordinance can preempt valid state taxing authority, and whether a state tax levied on non-Indians operates as an interference with tribal self-government.

———o———

SUMMARY OF ARGUMENT

The Washington cigarette sales tax is valid. Absent specific authorization by Congress, Indian Tribes have no authority to tax non-Indians. Since there is no Congressional act authorizing the tribal ordinances here, they cannot be applied to non-Indians purchasing cigarettes on the reservation. If valid, the tribal ordinances must be interpreted as imposed on the Indian retailers. There is no preemption of the state tax because there is no "governing act of Congress" which controls or taxes non-Indian purchasers of cigarettes on Indian reservations. Because the state cigarette tax is imposed on non-Indians, there can be no interference with tribal self-government, and the indirect economic ramifications of the state tax on tribal projects are completely irrelevant.

———o———

ARGUMENT

Tribal Ordinances Cannot Preempt State Taxing Authority Over Non-Indians

In *Moe v. Confederated Salish and Kootenai Tribes,* 425 U. S. 463 (1976), this court upheld Montana's cigarette sales tax as applied to on-reservation sales made by Indian tribal sellers to non-Indians. The Montana cigarette tax involved in *Moe* is so similar to the Washington cigarette tax as it operates on Reservations that it is clear that the State of Washington has the power to tax sales of cigarettes to non-Indians on Reservations. The question, then, is whether the existence of tribal ordinances which purport to levy a tax on the distribution of cigarettes by the Tribes necessarily invalidates the State power to tax.

The lower court in this case concluded that *Moe* was of little import because of the existence of the tribal ordinances. The court eliminated the State's power to tax non-Indians by relying on two legal theories:

(1) The state tax has been preempted by "governing acts of Congress" and (2) the state tax infringes "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U. S. 217, 220 (1959). The three-judge District Court relied upon each of these legal theories, in the alternative, in order to invalidate Washington's cigarette sales tax. In doing so, the District Court established an unlimited and previously unrecognized power of Indian Tribes to tax non-Indians on reservations.

A. The District Court Misinterpreted the Tribal Taxing Schemes

The District Court's holding that the tribal ordinances preempted an otherwise valid state tax was grounded upon a conclusion that the legal incidence of the Tribal taxes falls on non-Indian purchasers of cigarettes (Appendix to Jurisdictional Statement 36, 37). This conclusion, however, is contrary to the provisions of the ordinances. For instance, the Colville Tobacco Ordinance, Section 8, states that the tribal tax is "levied . . . upon distribution of cigarettes and other tobacco products by the tribes." The tribal tax thus is levied upon the wholesale distribution of cigarettes by the Tribes to the retailers. The tax is due from the retailers upon receipt of cigarettes from the Tribe. The fact that the retailers pass the tax on to the consumer by means of a higher retail price does not transform the tribal tax into one levied on the consumer or on the retail sales transaction. Thus the lower court's conclusion that the tax falls upon the ultimate consumer is unfounded.

B. Indian Tribes Have No Authority to Impose a Cigarette Sales Tax Upon Non-Indians

Not only did the District Court hold that the incidence of the Tribal sales tax fell primarily upon non-Indian purchasers of cigarettes, it also specifically held that Indian Tribes have the power to impose a tax on non-Indians (Appendix to Jurisdictional Statement 34).

Whatever authority Indian Tribes have to "make their own laws and be ruled by them." *Williams v. Lee, supra,* when Indian Tribes seek to exert governmental power over *non-Indians,* such power is extremely lim-

ited. The authority must either be inherent or there must be a specific Congressional act authorizing whatever governmental power a Tribe exerts over non-Indians. *Oliphant v. Suquamish Tribe,* 435 U. S. 191 (1978).

In *Oliphant* this Court said that because of their acknowledged dependence on the United States Government, Indian Tribes retain only elements of "quasi-sovereign" authority. Their relationship with the federal government necessarily strips Indian Tribes of many powers of sovereignty. This Court eschewed reliance on "inherent sovereignty" as a source of tribal authority and instead looked to the specific power sought to be exercised as an attempt to find some source for it. Finding no specific or implied authority for the proposition that an Indian Tribe has the power to exercise criminal jurisdiction over non-Indians who violate tribal law on the reservation, this Court held that no such power existed.

The distinct difference between a Tribe's authority over its members and a Tribe's limited authority over non-Indians was emphasized in *United States v. Wheeler,* 435 U. S. 313 (1978). *Wheeler* makes clear that the limited sovereignty of Indian Tribes does not include the power to regulate non-Indians.

The District Court apparently recognized that the Tribes do not inherently possess the power to tax non-Indians. The Court then correctly stated that the Tribes must obtain that power from Congressional delegation (Appendix to Jurisdictional Statement 32). However, the Court cited no specific statute delegating to the Tribes the power to tax non-Indians, and such a statute does not exist.

C. The Tribal Taxing Ordinances, Whether Imposed on Indians or Non-Indians, Cannot Preempt Valid State Taxing Authority

The legal basis for vitiating a state law because of federal preemption has been recently re-emphasized by this Court. In order to find preemption, there must be a showing of a "clear and manifest purpose of Congress" to supersede state powers. *Ray v. Atlantic Richfield Co.,* 435 U. S. 151, 157 (1978); *Douglas v. Seacoast Products, Inc.,* 431 U. S. 265 (1977); *Jones v. Rath Packing Co.,* 430 U. S. 519 (1977). Where a congressional enactment was passed to protect and guard its Indian wards, the state is free to regulate the same area in any manner that does not conflict with the federal act. *United States v. McGowan,* 302 U. S. 535 (1938); *Moe, supra.* Of primary importance is the existence of a "governing act of Congress" with which to compare the challenged state statute. *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 148 (1973); *Warren Trading Post v. Arizona Tax Commission,* 380 U. S. 685, 690 (1965); *Williams v. Lee,* 358 U. S. 217, 220 (1959).

The legal incidence of the challenged state tax falls directly and exclusively on non-Indian purchasers of cigarettes. Unless there is some congressional act which taxes or controls non-Indians purchasing cigarettes on an Indian reservation, the threshhold requirement of preemption cannot be met. Such an act does not exist. A tribal ordinance simply cannot oust state jurisdiction. Neither a tribal ordinance nor the signature of the Secretary of Interior rises to the level of a "governing act of Congress" which is necessary to find a clear and manifest purpose of Congress to supersede state powers.

Even if a tribal ordinance is equivalent to an act of Congress, the ordinance cannot have any more preemptive effect than it would if enacted by Congress. Accordingly, the tribal tax only affects the operation of such state law as is in direct conflict with it. *McGowan, supra; Moe, supra.* There is no conflict in this case. The Tribes have charged fees and imposed taxes which are levied and become due and payable at the time the retailers receive the cigarettes from the Tribes. The taxable event has occurred before the cigarettes are made available for purchase by non-Indians. There can be no conflict, therefore, if the state chooses to later tax non-Indian purchasers of those previously taxed cigarettes. Thus the tribal tax on the Indian distributor cannot preempt the state's tax on the non-Indian purchaser.

Washington State's Cigarette Taxing Scheme Does Not Constitute an Interference With Tribal Self-Government

The Tribes have claimed that the imposition of the State of Washington's cigarette sales tax upon reservation sales of cigarettes sold to non-Indians interferes with tribal self-government. The thrust of the Tribes' argument is as follows:

(1) Because of the state tax, the tribal sales tax is virtually inoperative. If the state tax must be paid, the tribal cigarettes lose their economic advantage and sales are drastically reduced.

(2) Because there are no reservation sales to non-Indians, the Tribe collects nothing from its own tax.

(3) Because there is no cigarette sales tax revenue, the Tribe's governmental projects are crippled.

Williams v. Lee, 358 U. S. 217 (1959) set out the test to be used in determining the extent and validity of a state's jurisdiction on Indian reservations when non-Indians are involved in on-reservation activities. The *Williams* test simply involves a determination of whether or not, absent governing acts of Congress, the state's action "infringes on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. This Court noted in 1973 that this test was to be used to resolve conflicts between Indians and non-Indians on a reservation. In this situation where "both the Tribe and state could fairly claim an interest in asserting their respective jurisdictions," the state may protect its interest up to the point where tribal self-government is affected. *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164, 179. If there is no infringement by the state, then the state has jurisdiction to act.

This Court has never applied the *Williams* "infringement" test to reach the conclusion of the lower court. Adverse but indirect economic effects on tribal budgets do not meet the *Williams* "infringement" test.

If the lower court's holding is affirmed, the result is far-reaching and uncontrollable. A Tribe could enact revenue-producing taxation ordinances of any nature affecting non-Indians, no matter how far removed from essential tribal rights of self-government and no matter how invalid. The Tribe could show that the resulting revenue was essential to tribal budgets and therefore to governmental functioning. The Tribe could then insist that a state's action in the same area was a prohibited "infringement" if the state's action diminished the

Tribe's revenue. These results are not minimized in any way either by the District Court's assumption that the state's burden of supplying services on Indian reservations *may* be reduced when a Tribe supplies services to its members; by the District Court's assurances of tribal self restraint; or by its assurances that Congress and the Secretary of Interior could prevent or limit such tribal enactments (Appendix to Jurisdictional Statement 36).

If the lower court's reasoning is to be followed, the State of Washington would be prohibited from repealing its cigarette tax all together. Such an action would cause the price of cigarettes off the reservations to fall below those taxed by the Tribes. This would severely reduce revenue to the Tribes and interfere with tribal self-government. Clearly this is not the kind of "infringement" which is encompassed in the *Williams* test.

———o———

CONCLUSION

The opinion of the three-judge District Court should be reversed. The Washington cigarette sales tax should be found valid with regard to reservation sales of cigarettes to non-Indians. The District Court's vast expansion of the *Williams* "infringement" test should be soundly rejected. The holding in *Moe v. Confederated Salish & Kootenai Tribes, supra,* should be reaffirmed, and the theory that Tribes may preempt valid state taxes merely by enacting similar taxes should be rejected.

Dated this 30th day of April, 1979.

Respectfully submitted,

HELENA S. MACLAY
DEIRDRE BOGGS
KEITH C. RENNIE
Special Assistant Attorneys General
State of Montana
Attorneys for Amicus Curiae